No. 16994

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. H. ELLE CONSTRUCTION CO.,
a corporation, and
ST. PAUL-MERCURY INDEMNITY CO.,
a corporation,

Appellants,

vs.

WESTERN CASUALTY AND SURETY COMPANY,
a corporation,

Appellee.

Reply Brief of Appellants

Appeal from the United States District Court for the District of Idaho, Eastern Division

A. L. MERRILL
R. D. MERRILL
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Residence: Pocatello, Idaho
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GATEWAY PRINTERS—POCATELLO

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STATEMENT OF FACTS

Upon considering the Statement of Facts set out in appellants' original brief and the Statement of Facts as set out by appellee in its brief, it is readily apparent that there is little, if any, dispute in the factual situation. It is also quite apparent that the dispute arises in the interpretation and inferences and arguments to be drawn from the stated facts. As a result, it is felt that no further Statement of Facts need be made in this Reply Brief.

ARGUMENT

The first point set forth by appellee in its brief deals with the question of whether or not the facts show permissive use with the permission of the named insured. Appellee insists that there had been no previous dealings whatsoever between the individuals involved herein respecting the use of this truck or any equipment of the Gagon Lumber Yard, and from that premise argues and quotes authority that there could not be any implied permission. Three things should be noted: (1) The record discloses considerable past dealings; (2) The record discloses without dispute that Gagon, the named insured, accepted, acquiesced in, and affirmed the permission and use of the vehicle; (3) The Western Casualty & Surety Company itself, appellee herein, after investigation of the facts, admitted the permission and the acquiescence in it.

As to the first point, the deposition in the printed record shows many instances of prior use. William S. Gagon, on page 125, testified as follows:

> "Q. Had Mr. Horsley been a customer at your yard prior to August of 1954?
>
> A. Yes.
>
> Q. For about how long?
>
> A. Oh, five or six years.
>
> Q. And he was in the construction business?

A. Yes.

Q. Had Mr. Horsley at any time ever used your truck in connection with any purchases he had made from you?

A. Yes.

Q. For what purpose was that truck then used?

A. At times he would come in and place an order for me to deliver and there would be one of us there alone, and we would load our truck up and ask Mr. Horsley if he would deliver it and bring our truck back.

Q. And is that the only time that Mr. Horsley ever used your truck?

A. Yes."

The Horsley referred to above is the same Horsley that was driving Gagon's truck in the accident giving rise to this litigation. This was in connection with purchases of merchandise and we also know from the testimony of Mrs. Gagon, on page 112 of the record, that C. H. Elle Construction Company had an account at this time with Gagon for merchandise purchased. Horsley testified to using equipment of Gagon. Beginning at page 139 the testimony is as follows:

"Q. Have you ever used any equipment of Mr. Gagon's before this one day?

A. I borrowed a truck from Mr. Gagon one time previously.

Q. For what purpose?

A. To haul steel forms from Pocatello to Grace.

Q. Who were you working for?

A. C. H. Elle Construction Company.

Q. Have you had any occasion to borrow or use other equipment from the Gagon Lumber Company?
Judge Baum: Objected to as too general, incompetent, irrelevant and immaterial and not tied in with the present accident, or with the C. H. Elle Construction Company.

Q. (By Mr. Merrill, resuming): Let me add to that question prior to August 22nd, 1954?

A. The only time I can think of I used to use Mr. Gagon's concrete cement mixer. We buy cement from Mr. Gagon and we have used his concrete mixer.

Q. Now, by we who do you mean?

A. Myself.

Q. Yourself. You were not working for Mr. Elle?

A. No."

On cross-examination, Mr. Horsley stated that, with respect to the above quoted incident, he did not recall getting the truck directly from Mr. Gagon, but he used the truck, securing it from the lumber yard. This again strengthens appellant's argument that a regular course of conduct existed between Mr. Gagon and Mr. Horsley and C. H. Elle Construction Company, and further that Mr. Gagon knew and agreed to and accepted the fact that his employees or helpers would and did loan the automotive equipment.

Mr. Horsley further testified to the use of Mr. Gagon's trucks. At page 142, he stated:

> "Grace, Idaho. Was there any arrangement between you and Mr. Gagon while you were working for Mr. Elle to borrow his truck?
>
> A. No, there was no direct understanding.
>
> Q. You had used Mr. Gagon's trucks several times before, had you not?
>
> A. Yes, I had used it previously.
>
> Q. Under what circumstances was it?
>
> A. In my own business to deliver merchandise.
>
> Q. Purchased from whom?
>
> A. Gagon.
>
> Q. And that was part of the understanding it was

to be delivered?

A. To deliver merchandise, yes.

Q. On those occasions what would happen?

Mr. Merrill: Object to as immaterial.

A. Well, didn't have a delivery man and we needed material and had to load it and unload it.

Q. (By Judge Baum, resuming): And you would take his truck?

A. Yes.

Q. And that is the only time you used Mr. Gagon's truck in getting material you purchased from him?

A. Yes.

Q. Did Gagon have that same arrangement with other customers, do you know?

A. Well, I think so."

From C. H. Elle, owner of C. H. Elle Construction Company, we learn the following, found at page 146:

> "Q. (By Mr. Merrill): Mr. Elle, have you or had you in the past borrowed from Mr. Gagon when you had jobs in that area?

> A. I believe that we made one or two small rentals from him, yes. I think our records show that."

Other items of evidence present, we submit, compelling inferences that implied permission existed based upon past acts and understandings. Mrs. Gagon had no hesitation whatever in loaning this truck. She had the lumber yard keys and without questioning at all, she gave the truck to Mr. Horsley. If she had never done so before; if she had been forbidden the right to loan; if she knew her husband refused to loan equipment; or if she had any doubts in her mind at all concerning the action, she would have hesitated. She did not hesitate. Upon turning over the truck to Mr. Horsley, Mrs. Gagon made no arrangements for gas, oil, details of use of rental—no questions at all. This truck was an expensive piece of equipment and its use of considerable importance in the business, and it cost a considerable amount to operate, yet Mrs. Gagon was so sure of her ground that the matter could be handled in a very cursory, off-handed way without any concern or even going over the details. We submit that this could come only from past understandings and dealings. This is not the procedure adopted when there has been no past experience, or when dealings are between complete strangers.

The record discloses without dispute that Mr. Gagon acquiesced in the permissive use. The day after the accident he, with Mr. Horsley, drove by the scene of the accident and at no time did Mr. Gagon indicate to Mr. Horsley that he felt Mr. Horsley was using the truck without permission,

and at no time did Mr. Gagon even claim that this was so. Mr. Gagon charged for the use of this exact truck on this exact date and his charge was paid. Appellee attempts to discount this act by saying Mr. Gagon acted under advice of counsel, but the bald fact remained that Mr. Gagon charged what he thought was proper for rental, sent the bill to C. H. Elle Construction Company, and that bill was paid at once along with other account items, and Mr. Gagon used this money. Nothing could indicate in a louder tone that Mr. Gagon had acquiesced.

The appellee itself has determined that permission within its own policy was present, because after investigation it paid the collision feature of this policy to Mr. Gagon, after the accident it did under oath represent that Mr. Horsley was covered (SR-21).

The acquiescence of Mr. Gagon and the acceptance of the fact of permissive use by the appellee are, we submit, completely without dispute in the record. They alone should compel a finding of permissive use.

Appellee, in the cases cited in its brief, failed to render any real support to its position. The question of permission herein is in the last analysis dependent upon the somewhat unique facts of this case. The factual situation presented in the case of Mason & Dixon Lines vs. Martin, 222 F.2d 328, relied upon by appellee and cited beginning on page 20 of its brief, deals with a situation where the driver had, as the only possible assumption, taken keys to the car from the owner, while the owner was asleep and without any

prior precedence for its use. The owner was driving alone and without permission of anyone. In the case of McKee vs. Garrison, 221 P.2d 514, cited at page 15 of appellee's brief, the basic problem was one of exceeding the permission granted. Our case shows that there was no restriction whatever on the use and the problem is not complicated by a use that exceeded the permission—permission was granted in our case for the use of the truck exactly as it was being used. Appellee also cites the case of United Service Automobile Assn. vs. Russom, 241 F.2d 296. Appellee's discussion begins on page 16 of their brief. Appellants have also cited this case for the principal involved that permission may be express, implied, or subsequently ratified, and that the named insured can signify his permission by course of conduct, which we submit Mr. Gagon did, by silence, which we submit Mr. Gagon did, and by subsequent ratification and acquiescence, which we submit, Mr. Gagon did.

A careful reading of the case of Wigington vs. Ocean Accident and Guaranty Corp. 231 N. W. 770, cited by appellee on page 34 of its brief, shows that this case has no application. There, without disclosing the policy language, the court held that: "As we view this insurance contract, at best, the insurance coverage thereunder is limited to the property of the paint company, save and except the Buick automobile herein insured, and to it only during the time it is in the company's use." The Buick was in fact owned by Mrs. McGill, and she loaned it to one, Crawford, to use for his own social purposes. Since the policy was issued to the paint company and included the Buick only when in the

company's use, clearly no coverage was afforded under the facts. This is, we submit, completely different from the case at bar.

We must take direct issue with appellee's arguments, set out on page 24-25 of its brief, dealing with the effect of the jury verdict in the state court case. We take direct issue with both the statement of fact and also the conclusions. Appellee states that the jury found, in the state court case, under the identical facts now before this court, that there was no permissive use. The record in this action does not bear out this statement. Since appellee has seen fit to make the statement, it is felt that the accurate facts must be set forth. In the state court case no evidence of Mrs. Gagon was offered; there was no evidence at all concerning the fact that Mr. Horsley had in the past used vehicles or that Elle had in the past borrowed from Mr. Gagon; there was no evidence at all that Mr. Gagon had billed the C. H. Elle Construction Company for the use of the truck and had been paid; there was no evidence at all of the fact that the Western Casualty & Surety Company paid the collision feature of this policy; there was no evidence at all of the fact that Western Casualty & Surety Company had stated under oath that Mr. Horsley was covered by their policy (S. R.-21). None of these things were in evidence in the state court proceedings. This court held in the previous opinion, found on page 213 of the transcript as follows: "There were no pleadings by the appellants and Mr. Gagon, and the appellee was not a party to the state action. Hence, the issue of permissive use, either within the meaning of the Idaho statute or the insurance

policy, has not yet been litigated by appellants or their privies against anyone; they have not yet had their day in court." We submit that there can be no question of the jury verdict because it was on an entirely different question, without the evidence that is now before this court. No paradox at all exists and no comparison is valid, as suggested by appellee.

On page 26 of its brief, appellee apparently complains that it should have been advised that no appeal was going to be taken against the judgment in the state court. Appellee had flatly and unequivocally refused to accept its responsibility under its policy. After having once refused it is in no position to now complain that repeated offers or tendors were not made.

Appellee, while tacitly admitting, as it must, that it filed an SR-21, and that the SR-21 did state under oath that Mr. Horsley was covered in this particular accident by this particular insurance policy issued by Western Casualty & Surety Company, insists that this cannot be considered, due to the wording of Section 49-1511, Idaho Code. The Code section under consideration is:

> "Matters not to be evidence in civil suits.—Neither the report required by section 49-1504, the action taken by the commissioner pursuant to this act, the findings, if any, of the commissioner upon which such action is based, nor the security filed as provided in this act shall be referred to in any way, nor be any evidence of the negligence or due care of either party, at the trial of any action at law to

recover damages."

This states, we submit, that in any negligence action at law for damages, the reports shall not be referred to in any way nor be any evidence of negligence or of due care. That is the entire burden of this section. It is, we submit, another instance of the careful attitude developing in negligence actions that the fact of insurance shall not be referred to or placed in evidence. The prohibition against its use is the prohibition of reference to its use as evidence in any action at law to recover damages growing out of property damage or personal injury as the result of an automobile accident. The suit at bar is an action for performance of a contract and not a negligence action. The Code section by its clear wording and purpose contains no prohibition against the use of the SR-21 as an admission against interest in a suit against the insurance company that issued it, when the questions of the fact of the accident or of negligence, is not involved. To accept the theory of appellee, it would mean that, even if suit were filed by the State of Idaho, for falsification of the SR-21 with a view to enforcing strict, accurate conformance by the insurance company, the SR-21 could not be used in evidence. We submit that in a suit directly effecting the propriety of making the statement itself, and against the very company that made the statement, when there is no prejudice about coverage by an insurance company as there is in a tort action, the SR-21 is admissable for what it is worth. In this action its worth is that it is a clear, notarized statement, made after investigation, that appellee considered

itself on the risk. State Farm Mutual Auto Ins. Co. v. Porter, 186 F.2d 834 (9 Cir).

In considering the case of Laughnan vs. Griffith, 73 N. W. 2d 587, page 37 of appellee's brief, the last portion of the Wisconsin statute involved allowing the notice of insurance filed to be used in evidence if the rules of evidence allow it, is merely stating the obvious. In a suit for tort, the SR-21 would not be admissable in evidence when it is filed by an insurance company not a party, because it would be immaterial and hearsay. The wording is to make sure that the proper interpretation is placed on the preceding sentence. When the proper construction is made of the statute in the first place, such cautionary provisions are not needed. It should be further pointed out that such language is perhaps needed in Wisconsin, where, as we understand it, and as is shown from the case of Laughnan vs. Grifffith, and from the case of Prisuda vs. General Casualty Co. of America, 74 N. W. 2d 777, appellant's brief, page 58, suit for negligently inflicting of damages can and is brought against the tort-feasor, and his insurance company all in the same action. Under these circumstances, it was required, therefore, that further clarification be made in the statute to the effect that the SR-21 does not effect the question of negligence (because it would be hearsay, but can be used if material as against the insurance company. In the case at bar, and in Idaho, at time of the statute and of this case, a suit could not be brought against the insurance company at the same time as against the tort-feasor, Stearns v. Graves, 61 Idaho 232, 99 P.2d 955.

Appellee discusses, beginning on page 45 of its brief, the so-called restrictive use of the vehicle as set out in the policy of insurance. The use designated under the policy, being item 5, indicates that the purpose is commercial and that the term commercial is defined as "used principally in the business occupation of the named insured as stated in item 1, including occasional use for personal pleasure, family, and other business purposes." The policy does not say that it must be used exclusively for one purpose or another with no exceptions, as is the case in the authorities cited by appellee on page 49 of its brief. The difficulty with appellee's position is that the policy allows occasional use for other business purposes. That is exactly the situation under the facts involved in this case. The use of this vehicle was a business purpose, as far as William Gagon was concerned. C. H. Elle Construction Company was a customer; Horsley was a customer; and Gagon himself charged and received rent for the use of this vehicle, which rental went into the funds of the Gagon Lumber Yard. The case of Birnbaum vs. Jamestown Mutual Insurance Co., 83 N. E. 2d 128 (N. Y.), cited in appellant's original brief is, we submit, squarely in point. It hardly seems proper for Western Casualty & Surety Co., when dealing with its own insured, to accept coverage and thereby agree that the use was within the purposes set forth in the policy, which is exactly what it did when the collision portion of this policy was paid to William Gagon (page 128), and now, when dealing with the third person, attempt to take an opposite stand. It has admitted its liability in this regard and, we submit, that appellee should not be allowed

to avoid it by taking an opposite, inconsistent stand.

Appellee on page 51 of its brief, apparently attempts to raise the point dealing with the other insurance clauses of the two policies involved. In this situation, regarding coverage, the omnibus insurer (appellee) has in its other insurance clause a prorata provision, while the other insurer (appellant) has an excess provision. It is, as we understand it, the general rule that where an excess clause and a prorata clause appear in concurrently effective policies of insurance and the prorata clause appears in the policy involved because of its omnibus provision and the excess clause appears in the other policy, the prorata policy, or the one with the omnibus clause, is primary insurance and liable to the limits of its policy, and the other policy is excess. 8 Appleman, Insurance Law & Practice, 334, section 4914; American Surety Co. vs. American Indemnity Co., 72 A. 2d 798 (N. J.); McFarland vs. Chicago Exp., 200 F. 2d 5 (7 Cir.); American Surety Co., of N. Y. vs. Canal Ins. Co., 258 F.2d 934 (4 Cir.); Indemnity Ins. Co. of North America vs. Metropolitan Casualty Co. of N. Y., 146 A. 2d 692 (N. J.); Firemen's Ins. Co. fo Newark vs. Continental Casualty Co., 339 P. 2d 602 (Calif.); Citizen's Mutual Automobile Ins. Co. vs. Liberty Mutual Ins. Co., 273 F.2d 189 (6 Cir.); Mountain States Mutual Cas. Co. vs American Cas. Co. 342 P.2d 748 (Montana); Insurance Counsel Journal, October 1955, pages 404-407.

In the case of American Surety Co. v. Canal Ins. Co., 258 F.2d 934 (4 Cir.), the Court, beginning at page 936, states as follows:

"The common, and highly desirable, practice of including extended coverage clauses in automobile liability insurance contracts, sometimes leads to duplications of coverages. To resolve the questions inherent in such duplications of coverages, most policies incorporate excess insurance or 'other' insurance clauses which usually follow the general rule that the policy insuring the liability of the owner of a described vehicle has the first and primary obligation.

* * *

"Such excess insurance clauses serve a useful purpose in avoiding conflict. They are neither invalid nor unconscionable, and they may be given effect without invalidating a pro rata contribution clause in the policy providing the other protection. Canal's policy here limits its liability to a proportion of the loss, based upon the relation of the policy limits, if there is other valid and collectible insurance available to the insured. That clause operates in countless situations in which the other insurance is not excess, and it is not rendered meaningless if appropriate effect is given to the excess insurance clauses. Thus, it is generally held, as stated by Appleman, in referring to our exact situation, that 'a nonownership clause (coverage of liabilities arising out of the use of a hired or other vehicle) with an excess coverage provision, does not constitute other valued and collectible insurance, within the meaning of a primary policy with an omnibus clause.' 8 Appleman, Insurance Law and

Practice 334, sec. 4914; McFarland v. Chicago Exp., Inc., 7 Cir., 200 F.2d 5; St. Paul-Mercury Indemnity Co. v. Martin, 10 Cir., 190 F.2d 455; Zurich General Accident & Liability Ins. Co. v. Clamor, 7 Cir., 124 F.2d 717; Michigan Alkali Co. v. Bankers Indemnity Ins. Co., 2 Cir., 103 F.2d 345; Continental Casualty Co. v. Curtis Pub. Co., 3 Cir., 94 F.2d 710; St. Paul Fire & Marine Ins. Co. v. Garza County Warehouse & Marketing Ass'n, 5 Cir., 93 F.2d 590; Farm Bureau Mutual Automobile Ins. Co. v. Preferred Acc. Ins. Co., D. C. W. D. Va., 78 F. Supp. 561; Aetna Casualty & Surety Co. v. Buckeye Union Casualty Co., 157 Ohio St. 385, 105 N. E. 568, 31 A. L. R. 2d 1317; American Surety Co. of New York v. American Indemnity Co., 8 N. J. Super, 343, 72 A.2d 798; Speier vs. Ayling, 158 Pa. Super, 404, 45 A. 2d 385; Grasberger v. Liebert & Obert, 335 Pa. 491, 6 A.2d 925, 122 A. L. R. 1201; State Farm Mut. Auto Ins. Co v. Hall, 292 Ky. 22, 165 S.W.2d 838; Travelers Indemnity Co. v. State Automobile Ins. Co., 67 Ohio App. 457, 37 N. E. 2d 198; Great American Indemnity Co. v. McMenamin, Tex. Civ. App., 134 S.W.2d 734; Central Surety & Ins. Corp. v. London & Lancashire Indemnity Co., of America, 181 Wash. 353, 43 F.2d 12.

"Canal points to an extended coverage provision in American Surety's policy which extends its protection to the owner, if not a carrier required by law to

> carry insurance, of a hired vehicle. Thus the lessor, as well as the lessee, had available to it the protection of both policies. There is no rule, however, that excess insurance may not be extended as such to an additional insured, and there is nothing in the extended coverage provision which suggests that American Surety intended to change the character and nature of the coverage afforded by the policy to its named insured, Johnson Motor Lines. The extended coverage provision does not refer, even by implication, to the excess insurance clause, and there being no conflict between them, we can, and must, give effect to both of them. * * *
>
> "For the reasons stated, we hold that Canal should be required to pay to American Surety the amount of its payment upon the judgments in the tort actions, up to the limits of liability in Canal's policy, and the costs, expenses and attorney's fees incurred in the investigation and defense of the tort claims."

It should be noted that in the above case, the Canal Insurance Co., was implicated because of its omnibus clause and it had a pro rata provision in the other insurance clause. The American Surety Co., had the other coverage involved and it further had an excess clause in the other insurance portion of the policy.

The case of Mountain States Mutual Casualty Co. vs. American Casualty Co., 342 P.2d 748 (Montana) is square-

ly in point, the omnibus insurer having a prorata clause and the other insurer having an excess clause. Syllabus 3 is as follows:

> "Where garage owner's garage liability policy provided coverage with respect to truck owned by garage owner but loaned to another which had nonownership policy providing only excess coverage and not pro rata coverage, garage liability insurer was liable for full extent of judgments rendered against the one to which truck had been loaned, in actions arising out of its negligent use, even though garage policy provided that its coverage applied only pro rata, as excess coverage provided by nonownership policy was not other insurance as to which liability could be applied."

In the case of Firemen's Ins. Co., of Newark v. Continental Cas. Co., 339 P.2d 602 (Calif.), at page 606 the Court says:

> "There is no conflict between the clauses of the two policies here when they are interpreted to mean (and such meaning is clear from them) that the 'prorate' provisions apply when both policies are issued to the truck owner, and that the 'excess' insurance provisions apply when one policy is issued to the truck owner and the other is issued to the truck hirer. So far as nonowned trucks are concerned, there is no 'double coverage.' When the tort-feasor's liability

> reaches the full amount of the primary liability policy, that is, the policy issued to the truck owner, then by reason of the 'excess' insurance provision of the truck hirer's policy, the liability of that policy comes into play. See American Surety Co. of N. Y. v. Canal Ins. Co. 4 Cir., 258 F.2d 934, reversing the decision in D. C. S. C. 1957, 157 F. Supp. 386 in which the policies contained both 'prorate' and 'excess' insurance clauses and the court held the nonownership policy was 'excess' to the other."

Losses should not fall irrevocably upon that insurer which first recognizes its obligations, while one that has neglected its duty is allowed to escape completely.

It is submitted that on the basis of the clear uncontradictory language set forth in these two policies and the authorities cited above, that the policy issued by the appellee is the primary coverage and must be completely exhausted. To this end appellants have demanded as damages the limits of the policy of the Western Casualty and Surety Company, to-wit, $10,000.00 personal liability, $1,620.00 property damage liability, plus court costs and attorney's fees for defending the state court action.

CONCLUSION

The vehicle involved in this action was, we submit, being driven with the implied permission and with the complete acquiescence and ratification of the named insured,

William Gagon. By force of the omnibus clause contained in the policy issued by Western Casualty & Surety Co., said company became obligated up to the limits of its policy as the primary insurer and, therefore, the claim of appellants' herein should be granted and the trial court reversed.

Respectfully submitted

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